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Supreme Court of The United States

October Term, 1981

NO. 80-2043

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM;

Petitioners,

v.

STEVEN A. PICO, BY HIS NEXT FRIEND, FRANCES PICO; JACQUELINE GOLD, BY HER NEXT FRIEND, RONA GOLD; RUSSELL RIEGER, BY HIS NEXT FRIEND, SAMUEL RIEGER; GLENN YARRIS, BY HIS NEXT FRIEND, RICHARD YARRIS AND PAUL SOCHINSKI, BY HIS NEXT FRIEND, HENRY SOCHINSKI,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF RESPONDENTS

Amicus supports the position of respondents and respectfully submits that the judgment of the United States Court of Appeals for the Second Circuit in the above-captioned case should be affirmed.[1]

1. *Amicus* has filed with the Clerk of the Court letters consenting to the filing of this brief from Lipp and Rubin, P.C., counsel for petitioners (the Board of Education, Island Trees Union Free School District No. 26 and the seven named individuals, who are members of the Board of Education of the District) and from Alan H. Levine and Arthur Eisenberg, counsel for respondents (Steven Pico, Jacqueline Gold, Russel Rieger, Glenn Yarris and Paul Sochinski, each of whom sues by a next friend).

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 638 F.2d 404 (1980). The order of the three-judge panel denying a petition for rehearing, the order of the active judges of the Court of Appeals for the Second Circuit denying a suggestion for rehearing en banc and opinions concurring in and dissenting from the denial of en banc consideration are reported at 646 F.2d 714 (1981). The opinion of the United States District Court for the Eastern District of New York is reported at 474 F. Supp. 387 (E.D.N.Y. 1979).

Interest of the Amicus Curiae

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance goodwill and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

Among its other activities directed to these ends, the Anti-Defamation League has filed briefs *amicus curiae* in many cases, including *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 347 U.S. 483 (1954); *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); and *Federenko v. United States*, 449 U.S. 490 (1981).

In this case, the Court is asked to decide whether a school board may remove books from a public secondary school library and from the curriculum, based on the board members' "personal values" and political ideologies, and on the school board's perceptions of the values held by the majority of residents in the community. This is an issue of national significance. "A censorial spirit is at work in the

United States, and for the past year or so it has focused more and more on books. Efforts to remove certain titles from school and public libraries, from paperback racks and bookstores, from the eyes of adults as well as children, have increased measurably." *The New York Times Book Review*, December 20, 1981 at p. 1.

Amicus is opposed to the unfettered exercise of such powers, based on its long-standing view that the best safeguards against bigotry are access to a wide body of opinions and an atmosphere conducive to full and free discussion of issues and ideas. *Amicus* submits that an affirmance in this case will enhance the learning and exchange of ideas, inculcate our youth with the values of a pluralistic political system and promote tolerance, openness and freedom in our society.

Questions Presented

1. Does a board of education violate the First Amendment when it prohibits the use, and thereby inhibits discussion of, certain books in the library and curriculum because the values represented in those books do not happen to conform to the personal ideologies of the school board members or to their perceptions of the values of a majority of the community?

2. When a board of education removes books from a school's library and curriculum in a manner and for reasons that violate the First Amendment, can it rely on other grounds which might have afforded a permissible justification were they the basis for its actions?

3. Do secondary school students have standing under the First Amendment to challenge the action of a board of education which bans certain books from their school library and prohibits their inclusion in the school's curriculum?

Statement of the Case

In September, 1975, three of the defendant members of the Board of Education of the Island Trees Union Free School District (the "Board"), including the Board's President and Vice-President, attended a conference sponsored by Parents of New York United (PONY-U), a "conservatively oriented parents group." 474 F. Supp. at 389. There they obtained what Board President Richard Ahrens described as "lists of books considered objectionable by some persons." 638 F.2d at 407.

On November 7, 1975, Ahrens and Board Vice-President Frank Martin searched the high school's library card catalogue for any of the "objectionable books," and found nine. Two others were found in subsequent searches conducted at the Board's direction.[2]

On February 24, 1976, following a "private session" of the Board at which the Superintendent of Schools and the principals of the senior and junior high schools were in attendance, the Board directed that the objectionable books be removed. Superintendent of Schools Richard Morrow sent the Board a memorandum discouraging the "banning" of books based strictly on "someone else's list." 638 F.2d at 409. Nonetheless, five days later, Morrow received a memorandum from Ahrens directing that "*all copies* of the library books in question be removed from the libraries to the board's office . . . ." (emphasis in original). Joint Appendix at 47. The Superintendent followed this order and removed all eleven books.

The Board explained its position in a press release issued March 19, 1976. Referring to the PONY-U conference, the Board stated that "at the conference, we learned of books

2. The eleven books are: *Slaughterhouse Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories by Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, Anonymous; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain't Nothing But a Sandwich*, by Alice Childress; *Soul On Ice*, by Eldridge Cleaver; *A Reader for Writers*, edited by Jerome Archer; and *The Fixer*, by Bernard Malamud.

found in schools throughout the country which were anti-American, anti-Christian, anti-Semetic [sic], and just plain filthy." 638 F.2d at 410.

The Board met again on March 30, 1976, ratified the directive removing the books from the library and appointed a Book Review Committee comprised of four parents and four staff members to read the books and make appropriate recommendations. On July 1, 1976, the committee rendered its final report. The committee recommended that five of the books be retained, that two books be removed, and that one be placed on the restricted shelf of the libraries, to be made available to students with parental approval only. The committee reached no decision as to the remaining three books.

The committee's recommendations were ignored by the Board. At a meeting on July 28, 1976, the Board voted to remove nine of the eleven books concerned "from . . . secondary libraries and for use in the curriculum," and to place one book on the restricted shelf. Only one of the eleven volumes originally removed by the Board was returned to the library on an unrestricted basis. 474 F. Supp. at 391.

The Board has in this litigation characterized its motivation principally in terms of the claimed vulgarity or explicitness of the material involved. Five of its members stated in deposition that they supported removal of certain volumes because the books contained "obscenities, were irrelevant to our curriculum, were inappropriate, and were in bad taste." Joint Appendix at 119-20; Affidavit in Support of Motion for Summary Judgment ¶ 4. These justifications, however, appear to be little more than afterthoughts. Prior to the report of its committee — which it disregarded — the Board's actions were based solely on the material handed out at the PONY-U conference. The Board itself undertook no analysis of the books in terms of their purported vulgarity. It also made no attempt to ascertain whether other books may have been

more vulgar than those removed and it conceded that the books which were removed were not actually obscene. 474 F. Supp. at 392.[3]

The true motivation of the Board is best evidenced by its contemporaneous statements and by candid admissions of some of its members. These point clearly to the conclusion that the Board banned books from the secondary school library and curriculum because of its own political and social philosophy and its belief that it was imposing the will of the majority of the school district's residents.

The list of objectionable books distributed at the PONY-U conference, on which the Board so heavily relied, contained editorial underlining of excerpts and comments which were undeniably political. For example, a comment on Eldridge Cleaver's *Soul on Ice* labeled it "full of anti-American material" and "seditious and disloyal matter." 638 F.2d at 407. And *Our Sexual Evolution*, by Helen Cotton, was deemed "anti-Christian and contrary to the laws of God. It has chapters on Group Marriage, Communes, Abortion, Contraceptives etc. It also promotes women's lib." *Id.* at 408.

Furthermore, Board President Ahrens plainly disclosed the political nature of the Board's decision in his affidavit submitted to the District Court:

> "I am basically a conservative in my general philosophy and feel that the community I represent as a school board member shares that philosophy. It is

3. Further evidence that the rationale for banning the books advanced by the Board in the course of this litigation may not reflect the basis on which it acted can be found in its treatment of the book *A Reader for Writers*. The list distributed at the PONY-U conference had included that book because, in one essay, it "equates Malcolm X, considered by many to be a traitor to this country, with the founding fathers of our country." Yet in this litigation, defendants Ahrens and Martin have contended that the Board's objection to the book (which was removed from the shelves solely on the basis of the PONY-U list) related to the presence of Jonathan Swift's classic satire "A Modest Proposal," in which Swift suggested ironically that the solution to Ireland's dual problems of overpopulation and starvation was to eat babies. 638 F.2d at 437 (Newman, J., concurring).

> to this that I attribute my re-election on a number of occasions. *I feel that it is my duty to apply my conservative principles to the decision making process in which I am involved as a board member. . . .*" Joint Appendix at 21; Affidavit of Richard J. Ahrens ¶2 ("Ahrens Aff.") (Emphasis added).

Ahrens characterized his re-election, together with that of other Board members, as a "complete vindication for and support of our stand concerning these books. We are representing the community which first elected us and re-elected us and our actions have reflected its intrinsic values and desires." Joint Appendix at 27; Ahrens Aff. ¶18.

18. And the Board as a whole conceded, in responding to an editorial criticizing the book ban, that "one of the purposes of a Board of Education is to see that local control is maintained and that the will of the majority prevails." Joint Appendix at 95.

Plaintiffs, who were students at the Island Trees secondary schools, commenced this action in 1976 to challenge the Board's book banning resolution and to compel restoration of the books to the library and the curriculum. The District Court granted the Board's motion for summary judgment, denied plaintiffs' cross-motion for summary judgment and dismissed the complaint. A divided Second Circuit reversed and remanded the case for trial on the merits of plaintiffs' constitutional claims. Thereafter, the Board's motion for rehearing was denied by the three-judge panel, and an evenly divided panel of the active Judges of the Circuit effectively denied en banc consideration. This Court granted certiorari on October 13, 1981.

Summary of Argument

The action of the Island Trees Board of Education in removing certain books from the school library and banning their use in the curriculum is unconstitutional, because it seeks to impose the political and social views of

the board members and a purported majority of community residents on students at the school by condemning certain ideas and effectively removing them from the realm of debate. This casts a pall of orthodoxy on the educational process which this Court has deemed impermissible.

The Board's impermissible motive infects the ban; its action cannot be rectified by a judicial determination that the Board's action might have been justified on some other ground.

The student plaintiffs have standing in this case because they suffer the direct impact of the Board's constitutional violation, whether it be termed an infringement of the students' "right to know" or the impermissible imposition of a pall of orthodoxy on the curriculum in their schools.

ARGUMENT

POINT 1

THE ISLAND TREES SCHOOL BOARD VIOLATED THE FIRST AMENDMENT BY BANNING CERTAIN BOOKS FROM THE SCHOOL LIBRARY AND CURRICULUM

Among the most precious and meaningful rights in any true democratic society are the rights to express and have access to the full spectrum of political and social thought. As is shown below, the book ban ordered by the petitioners in this case violates the First Amendment because it was intended to and did cast a pall of orthodoxy on the Island Trees Free Union School District, excluding ideas simply because they did not conform to the ideological beliefs of the Board's members and, in their opinion, of the people they represented.

A. Banning Books in a Manner Which Casts a Pall of Orthodoxy Violates the First Amendment

A board of education is charged with the power and duty to formulate educational policy which, at the elementary and secondary school level, necessarily includes indoctrination of one sort or another. In determining the education and the indoctrination that its students are to receive, a school board unquestionably has wide latitude. *Swann v. Board of Education*, 402 U.S. 1, 16 (1972); *James v. Board of Education*, 461 F.2d 566, 573 (2d Cir. 1972).[4]

This does not mean, however, that a school board may ignore the First Amendment. It is now over a decade since this Court held that neither "students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). Previously, a line of cases had established that members of a school community have the right to be free from a "pall of orthodoxy," whether that pall be cast by teachers or officials and whether its hue is political, social or religious. *See Epperson v. Arkansas*, 393 U.S. 97 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Although these cases do not address the precise issue now before this Court,[5] they stand firmly for the proposition

4. The precise contours of a school board's right to indoctrinate students present issues which are not affirmatively before the Court and need not be addressed in this case.

5. Lower courts which have confronted this issue have reached varying results. Overturning book bans, in addition to the Court of Appeals below, were: *Minarcini v. Strongsville City School District*, 541 F.2d 577, 582 (6th Cir. 1976) (school board may not remove books from the school library or the curriculum merely because it finds them objectionable in content on the basis of its own political or social tastes); *Salvail v. Nashua Board of Education*, 469 F. Supp. 1269 (D.N.H. 1979) (removal of magazine on basis of content not supported by substantial governmental interest); *Right to Read Defense Committee of Chelsea v. School Committee of Chelsea*, 454 F. Supp. 703 (D. Mass. 1978) (school committee's removal from library of anthology with "offensive" language violated

that a school board violates a student's First Amendment right to be free from the "pall of orthodoxy" where it seeks to indoctrinate or inculcate values by condemning and excluding ideas it does not wish to promote. As stated by Judge Newman, concurring in the Court of Appeals: "It is one thing to teach, to urge the correctness of a point of view. But it is quite another to take any action that condemns an idea, that places it beyond the pale of free discussion and scrutiny." 638 F.2d at 432-33.

For example, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), this Court struck down regulations in New York which prohibited the appointment and retention of "subversives" as superintendents, principals, teachers or other employees in public schools. The Court's principal concern was that the vagueness of the term "subversive" would lead to self-censoring by teachers, the result of which would be to deprive students of exposure to ideas:

> " 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future

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students' "right to read and to be exposed to controversial thoughts and language").

Even those courts which have upheld book removals have recognized that the right of school officials to make curriculum and library procurement decisions ends where the potential for a pall of orthodoxy begins, but they draw the line elsewhere. *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980). See also *Cary v. Board of Education*, 598 F.2d 535, 544 (10th Cir. 1979) (ban of use of certain books lawful where parties stipulated "no systematic effort was made, to exclude any particular type of thinking or book").

The Second Circuit, in a case decided before the present one, upheld the removal of a book from the school library noting that "there was no showing of a curtailment of freedom of speech or thought." *Presidents Council, District 25 v. Community School Board No. 25*, 457 F.2d 289, 293 (2d Cir.) *cert. denied*, 409 U.S. 978 (1972). As Judge Newman explained in his concurrence in the Court of Appeals decision in this case, only one book had been removed, the reasons for removal were the presence of obscenities and explicit sexual interludes, and no political motivation for the removal was shown or even alleged. 638 F.2d at 435.

> depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues', [rather] than through any kind of authoritative selection. . . ." 385 U.S. at 603 (citations omitted)

Similarly, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), a compulsory flag salute procedure in the schools was held unconstitutional. The Court cited the coercive nature of the requirement, which it found would elevate one set of beliefs not through intellectual argument and discussion but through the debasement of other views. "If there is any fixed star in our constitutional constellation," wrote the Court, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . . " 319 U.S. at 642.

In that very same case this Court also held that actions which result in the impermissible exclusion of ideas from the schoolhouse do not become proper merely because they are supported or demanded by a majority of people in a school district or a state. At the heart of the First Amendent is the precept that the majority does not rule where the expression of ideas and beliefs is at issue:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's rights to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.* at 638.[6]

6. The Court has steered the same course in balancing rights in the context of public schools where the challenge is based on the First Amendment's establishment clause. Thus, *Epperson v. Arkansas*, 383 U.S. 97 (1968), held unconstitutional an Arkansas statute which prohibited public school teachers from teaching the Darwinian theory of evolution because the theory conflicted with certain religious beliefs.

Given the setting of each of these cases in the public school, and given this Court's previously expressed view that students in public schools have First Amendment rights (*Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)), there is no reason these principles should not apply to the action of a school board in removing books from a school library or curriculum. To be sure, in a secondary school those rights must necessarily be subject to the need for decorum and the rights of other students to learn in a conducive environment. *Id.* Nor could one quarrel with a school board's decision to refrain from ordering books or to remove them from the curriculum for financial reasons (*Epperson v. Arkansas*, *supra*, 393 U.S. at 111 (Black, J., concurring)) or because they are obscene (*Miller v. California*, 413 U.S. 15 (1973)). But a determination which embodies a value judgment that materials have no place in a school, simply because they contain thoughts or ideas different from those held by the board or the community at large, imposes a pall of orthodoxy on the school curriculum, and thus runs afoul of the First Amendment as it has been consistently interpreted by the decisions of this Court.

B. The School Board's Actions Here Cast an Impermissible Pall of Orthodoxy

In this case, the Board's action in banning books already in circulation in the school library—and in one instance assigned reading for a course—was openly motivated by political considerations and was tantamount to censorship of the books and the ideas contained in them.

Petitioners proclaim to this Court without qualification that they are "unashamedly and unabashedly conservative in the traditional and generic sense of the word." Petitioners' Brief at 39. Petitioners' political orientation is itself irrelevant and a matter of no concern to the Court. But by

their own assessment, petitioners' political philosophy permeated every aspect of their functioning as members of the board, including the "establishment of curriculum." *Id.* And the record in this case leaves little doubt that the Board's decision to exclude books from the library and curriculum was a product of its political ideology which—whether it be liberal, conservative or otherwise—cannot be used by a school board as a basis for excluding books espousing a contrary view.

The Board's actions were not prompted by any evaluation of its own of the books used in the school system, but rather by a list provided at a politically-oriented conference. That list found books "objectionable" primarily because they expressed unorthodox ideas; indeed, several of the books ultimately removed were singled out because they purportedly contained "anti-American" or "anti-religious" ideas. See pp. 4 to 7, *supra*. Although the Board went through the pretense of establishing a procedure for independent review of the books, it ultimately ignored the recommendations of the committee of parents and educators it had appointed, and it reaffirmed its prior decision to remove virtually all of the books which had appeared on the list.

Furthermore, the Board and its members made no secret of their intentions. To the contrary, they made clear to the public the political underpinning of the Board's action, and the significance of the book ban, by issuing press releases—which referred to the conference and labelled the books, among other things, "anti-American"—by conducting a survey on the book banning, and by making the ban a central issue in the Board's election campaign. 638 F.2d at 409-12.

In this atmosphere and with the Board's publicly stated intent, the impact of the book ban could hardly have been a matter of speculation. It communicated to the students

and their teachers that ideas contrary to the political philosophy of the Board were taboo in the public school system. And it imposed an orthodoxy of political thought which does not warrant—and under the precedents of this Court does not have—the sanction of the Constitution.

It is no answer to this to suggest that the First Amendment has not been offended because the Board's ban does not, on its face, preclude discussion of the books or comment on the ideas and positions they contain. Petitioners' Brief at 4. It is now beyond dispute that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). In addition, "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *Id.* "The danger of that chilling effect upon the exercise of First Amendment rights must be guarded against by sensitive tools. . . ." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

The "chilling effects" of the Board's order in this case on teachers and students are not difficult to imagine. At a minimum, a teacher would be seriously hindered in conducting a full and open discussion of a book which he is forbidden to assign and which even the curious and intellectually challenged students would not find accessible in the school library. More likely is the possibility that teachers would engage in no such discussions for fear of losing their jobs. And impressionable students might easily conclude that books whose very presence on the library shelves is perceived as inappropriate by elected community officials must contain ideas so repugnant as not to be fit subjects for debate, assuming, of course, that the existence of the banned books ever became known to them.

That official disapproval of ideas can be communicated effectively even if subtly has prompted this Court to be especially wary of governmental action when First

Amendment rights are implicated. See, *e.g.*, *N.A.A.C.P. v. Button*, *supra*. The Board's resolution here does not explicitly ban the discussion of the books, but for all practical purposes achieves the same result and thus impermissibly restricts First Amendment rights.

POINT 2

THE SCHOOL BOARD'S POLITICALLY-MOTIVATED BAN CANNOT BE SAVED BY THE EXISTENCE OF FACTORS THAT MIGHT OTHERWISE HAVE JUSTIFIED IT

Petitioners, invoking Judge Mansfield's dissent below (638 F.2d at 419), claim that vulgar language and sexual explicitness in the books they banned justify their actions even though they were prompted to act by political considerations. This argument not only is contrary to the views this Court has espoused on First Amendment issues but, if accepted, would require the judiciary to perform the powers of a school board in each and every litigated case.

As has already been indicated in Point 1 (see pp. 8 to 15, *supra*), this Court, recognizing the existence of a "chilling effect," has repeatedly held that ambiguous and overbroad regulation will not be tolerated where First Amendment rights are involved. As was stated in *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963):

> "If the line drawn by the decree between the permitted and prohibited activities . . . is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other

> factual contexts besides that at bar." 371 U.S. at 432 (citations omitted).

See also Thornhill v. Alabama, 310 U.S. 88, 98 (1940) ("[w]here regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or evidence under it, which prescribes the limits of permissible conduct . . .").

The same policy that underlies this Court's practice of invalidating actions that have a chilling effect on First Amendment rights also dictates that a book ban that was ordered for impermissible reasons—as this one was—cannot stand, even if other reasons justifying the ban might also have existed. Politically motivated bans are improper because they have an inhibiting effect on the dissemination of ideas which do not conform to those of the governing body. This is no less the case where "mixed motives" are claimed to have inspired the ban or where arguably permissible reasons are advanced after-the-fact. In the latter situation, retroactive validation of an unconstitutional action could also have the undesirable consequence of encouraging the practice of banning first and casting about for an acceptable reason later.[7]

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7. This Court's decision in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), does not, as the Board suggests, compel a contrary result. There, an untenured school teacher sought reinstatement and back pay, claiming that his First Amendment rights were violated by the Board's refusal to rehire him. The District Court found for the teacher because the decision was based in part on constitutionally protected conduct—the school teacher's comments about a memorandum relating to teacher dress and appearance. The court also found, however, that the teacher had engaged in conduct which in fact provided the board with reasons for not rehiring him.

This Court held that if the board would have in fact reached the same decision in the absence of the protected conduct, the Constitution was not violated in a manner necessitating remedial action. Otherwise, the Court reasoned, an employee could maneuver himself into a better position merely by exercising his constitutional rights. Accordingly, the case was remanded for a determination of that issue. *(footnote continued)*

Moreover, recognition that a school board might rely on new bases for its action would lead to the very sort of intervention in school affairs the Board decries in this case. Judge Mansfield based his dissent on extensive quotation from the banned books and his conclusion that they contained vulgarities, profanities and sexual descriptions which would have given the Board a sufficient basis for restricting access to the books. But Judge Mansfield's analysis cannot substitute for that of the Board. Whether a book is suitable for public school students as an educational matter is an issue which, within constitutional limits, is generally committed to the discretion of local school boards. Here, at the time the ban was imposed, the Board made no analysis such as the one Judge Mansfield undertook later. For the courts to do so after litigation has already been commenced would put them in "the role of super board of education for every school district in the nation." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 237 (1948).

The function of the courts in reviewing a decision by a school board to ban books is limited to determining whether the Board's action was intended to condemn certain ideas or censor the expression of beliefs in a manner that violates

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Mt. Healthy does not apply here for three reasons. First, there is no issue in this case as to causation. There is no evidence in the record that the Board discussed, analyzed or debated concerns about vulgarity or sexual explicitness when it met and resolved to ban the books.

Second, the balance of interests weighs far more heavily here on the side of First Amendment rights. Competing with the right to free speech in *Mt. Healthy* was the strong interest of the school board in not returning an unfit teacher to the classroom. This hardly compares with any alleged harm that might result from the presence of vulgar material in a book in the school library. Moreover, any contention by the Board that the vulgarity and sexual explicitness of the books render them unsuitable for educational purposes should be considered in the context that those concerns were at best peripheral to the Board's initial determination.

Finally, the Court's concern in *Mt. Healthy* with the teacher's ability to maneuver himself into a better position obviously has no analogue here. Books can hardly maneuver themselves into a better position by exercising First Amendment rights.

the First Amendment. The evidence in the record supports the conclusion that such impermissible motives entered into the Board's decision in this case. It is neither necessary nor appropriate for the judiciary to carry the inquiry any further.

POINT 3

STUDENTS OF THE ISLAND TREES SECONDARY SCHOOLS HAVE STANDING TO CHALLENGE THE BOARD'S BOOK BANNING RESOLUTION

The general principles governing standing have frequently been articulated by this Court. Plaintiffs have standing if they have suffered "some threatened or actual injury resulting from the putatively illegal action" (*Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973)) and if the "provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Students and their parents have specifically been accorded standing to challenge school policies which are alleged to have violated basic constitutional rights. See *Abington School District v. Schempp*, 374 U.S. 203, 224 n. 9 (1963).

Under these principles there should be no question whatsoever that the plaintiffs in this case, who are secondary school students in the Island Trees Free Union School District, have standing to challenge the order of the Board which removed books from their library and prevented their use in the curriculum. The First Amendment gives the students a right to be free from a pall of orthodoxy. The challenged action — removal of the books from the school library and curriculum — infringes that right and causes them direct and immediate injury.

Moreover, it is the students who are best situated to enforce these rights. It may be of little concern to an author that his or her book was removed from the library shelves of one secondary school. And teachers may be

reluctant to challenge such activities out of fear that it would jeopardize their employment.

The Board argues that its secondary students do not have a "right to know," as that concept was discussed in *Virginia State Board of Pharmacy v. Virginia Consumers Council, Inc.*, 425 U.S 748 (1976), because, for some unexplained reason, that right applies only to "commercial speech." Also advanced is the proposition that a "right to know" requires the existence of a reciprocal "right to speak," that the books in this case do not themselves have a right to speak and that, therefore, the predicate for a right to know does not exist. On the basis of these arguments, the Board contends that the students who commenced this suit have no standing to challenge its actions.

But the right asserted by the students in this case is the right to be free from the pall of orthodoxy—which would exclude from the classroom a whole range of political and social ideas—and not simply the right to know what is in particular books which have been banned. This right to be free from the pall of orthodoxy was recognized by this Court long before its decision in the *Virginia State Board of Pharmacy* case. See, *e.g.*, *Keyishian v. Board of Regents*, *supra*, and *West Virginia Board of Education v. Barnette*, *supra*.

Even if the only right involved here was a student's "right to know," that right was plainly violated by the Board's book banning order. The suggestion that the *Virginia State Board of Pharmacy* case establishes a right to know applicable only to commercial speech, and not to information relating to social and political values and ideas, has no validity whatsoever; if anything, commercial speech would be entitled to a *lesser* degree of protection than, for example, political communication. *Virginia State Board of Pharmacy* was but one in a line of cases in which this Court has recognized the existence of a generalized right to know information. In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), for example, this Court recognized the

right of individuals to "receive information and ideas" from an alien; and in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), it upheld the right to receive political publications sent from outside the United States.

These cases also dispose of petitioner's contention that there can be no "right to know" without a reciprocal right to speak, since in both, the person or entity seeking to communicate political ideas was an alien, with no protectible First Amendment rights.

CONCLUSION

The need for free and open discussion of all sides of all issues is not merely a matter of abstract theory. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

The Island Trees Board of Education has unconstitutionally acted so as to restrict this process of inquiry and growth in its public schools.

Amicus urges that the judgment of the Court of Appeals reversing the District Court's grant of summary judgment to the Board, be affirmed.

Respectfully submitted,

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